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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 422

W. W. CUSTER, PETITIONER,

vs.

ROB B. McCUTCHEON, SUBSTITUTED FOR F. M. BRESHEARS, DECEASED, UNITED STATES MARSHAL FOR THE DISTRICT OF IDAHO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 4, 1930

CERTIORARI GRANTED OCTOBER 20, 1930

(35,344)

(35,344)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 18, 1931

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IN THE

District Court of the United States

For the District of Idaho

Southern Division

W. W. CUSTER,

Plaintiff,

vs.

F. M. BRESHEARS, United States Marshal for the District of Idaho,

Defendant.

No. 1530

COMPLAINT

Comes now the plaintiff above-named and complains of the defendant above-named and for cause of action alleges:

I.

That the defendant, F. M. Breshears, is the regularly appointed, duly qualified and acting United States Marshal within and for the District of Idaho.

II.

That on the 9th day of October, 1929, the de-

fendant above named, acting, or pretending to act, under and pursuant to a purported writ of execution issued out of the District Court of the United States, for the District of Idaho, Southern Division, under and upon a certain judgment made and entered in the said court on the 7th day of March, 1921, in a certain cause wherein the United States of America was plaintiff, and George H. Schodde, W. W. Custer, Louis Nelson, C. H. Matson and Claude Myers were defendants, which judgment was against the defendants in said action jointly and severally in the sum of $2086.87, and which said execution is in the amount of said judgment, together with interest thereon from the said 7th day of March, 1921, amounting to the aggregate sum of $3500, levied upon certain property and moneys of this plaintiff, to-wit: upon the sum of $3500, or the amount mentioned in said purported execution, of moneys of plaintiff on deposit to the credit of plaintiff in the Lincoln County National Bank at Shoshone, Idaho.

III.

That this plaintiff was one of the defendants mentioned in the action aforesaid, and that he has ever since the said 7th day of March, 1921, continuously resided at Shoshone, in the county of Lincoln, state of Idaho.

IV.

That under the laws of the United States and of the state of Idaho, and the rules of this court, the judgment aforesaid is unenforcible by reason of limitations, and that the purported execution issued thereunder on the 21st day of September, 1929, under and pursuant to which the defendant herein has made the levy and committed the acts hereinabove alleged, was, and is in all respects void and invalid.

V.

That notwithstanding the fact that said judgment is unenforcible as aforesaid, and that the said purported execution is in all respects void and invalid, the defendant herein threatens to, and will, unless restrained therefrom by proper order of this court, take into his possession the moneys of plaintiff levied upon as aforesaid and now on deposit in said Lincoln County National Bank at Shoshone, Idaho, and will apply said moneys of this plaintiff to the payment and satisfaction of said unenforcible judgment and void and invalid execution, all of which will be to the great and irreparable injury of plaintiff, and that such irreparable injury will result to the plaintiff herein before the matter of issuing a preliminary restraining order herein can be heard on notice.

VI.

That plaintiff does not have any plain, speedy or adequate remedy at law.

WHEREFORE, Plaintiff prays judgment, that pending the final determination of this action, the defendant be enjoined and restrained from withdrawing the moneys of plaintiff on deposit in the Lincoln County National Bank of Shoshone, Idaho, to the credit of plaintiff from said bank and from applying or using said moneys in the payment or satisfaction of the judgment of this court, made and entered on the 7th day of March, 1921, in that certain action wherein the United States of America was plaintiff, and George H. Schodde, W. W. Custer, Louis Nelson, C. H. Matson and Claude Myers were defendants, and of the purported execution issued thereunder on the 21st day of September, 1929;

That the judgment hereinabove mentioned and referred to be adjudged and decreed to be unenforcible as against this plaintiff, and that the execution issued thereunder as hereinabove alleged be decreed and adjudged to be in all respects void and invalid; for his costs and disbursements in this behalf incurred and expended, and for such other and fur-

ther relief as to the court may seem meet and equitable.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff,
Residing at Twin Falls, Idaho.

(Duly Verified and Service Acknowledged.)

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER FOR TEMPORARY RESTRAINING ORDER

The plaintiff in the above entitled cause having commenced an action in the District Court of the United States for the District of Idaho, Southern Division, against the defendant, and having prayed for an injunction against the defendant requiring him to refrain from certain acts in said complaint, and hereinafter more particularly mentioned:

Now, on reading the complaint in said action, duly verified and it satisfactorily appearing to me therefrom, and the United States Attorney appearing for defendant F. M. Breshears,

IT IS ORDERED, That a temporary restraining order issue out of this court by the clerk thereof, to the effect that the defendant F. M. Breshears be and he is hereby restrained from disbursing or transferring any and all funds and monies now in his possession or which may hereafter come into his possession under and by virtue of that certain execution heretofore issued out of this court on the 21st day of September, 1929, on a judgment in the case styled United States of America vs. George H. Schodde, et al, No. 853 Southern, and is hereby ordered to retain custody of any and all of such funds until further orders of this court.

This order is made and conditioned upon the above named plaintiff filing with the clerk of this court a good and sufficient bond for this restraining order, in the sum of five hundred dollars.

Dated this 10th day of October, A. D. 1929.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

TEMPORARY RESTRAINING ORDER

The President of the United States to F. M. Breshears, United States Marshal for the District of Idaho, the above-named defendant:

The plaintiff having filed his complaint in the District Court of the United States, for the District of Idaho, Southern Division, against the defendant praying for an injunction against the defendant requiring him to refrain from certain acts in said complaint, and hereinafter more particularly mentioned. On reading the said complaint in this action, duly verified, and it satisfactorily appearing to the said court therefrom that it is a proper case for an injunction, that sufficient grounds exist therefor, and an undertaking having been given, and the United States Attorney appearing for the defendant F. M. Breshears;

We therefore, in consideration thereof, and of the particular matters of the said complaint set forth, do strictly COMMAND you, that until the further order of said court, you, and your servants, agents, attorneys, employees, and all persons acting under the control, authority or direction of you, do absolutely refrain from and desist from disbursing or transferring any and all funds and monies now in your possession or which may hereafter come into your

possession under and by virtue of that certain execution heretofore issued out of this court on the 21st day of September, 1929, on a judgment in the case styled United States of America vs. George H. Schodde, et al, No. 853, Southern, and you are hereby enjoined to retain custody of any and all of such funds until further orders of this court.

WITNESS, The Honorable Charles C. Cavanah, Judge of the District Court of the United States for the District of Idaho, Southern Division, and the seal of said District Court this 10th day of October, 1929.

W. D. McREYNOLDS, Clerk.

(Seal)

(Service Acknowledged.)

Endorsed, Filed October 10, 1929.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

UNDERTAKING FOR TEMPORARY INJUNCTION

WHEREAS, The above named plaintiff has commenced an action in the District Court of the United States for the District of Idaho, Southern Division, against the above-named defendant, and is about

to apply for a temporary injunction in said action against the defendant enjoining and restraining the defendant from the commission of certain acts as in the complaint filed in the said action are more particularly set forth and described:

NOW, THEREFORE, We, the undersigned, HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and having complied with the constitution and laws of the state of Idaho relating to foreign corporations, and being legally qualified and entitled to execute bonds and undertakings as a surety within the state of Idaho, in consideration of the premises and of the issuing of said temporary injunction, do jointly and severally and undertake in the sum of five hundred ($500) dollars, and promise to the effect that in case said injunction shall issue the plaintiff will pay to the said party enjoined such damages not exceeding the sum of five hundred ($500) dollars as such party may sustain by reason of said temporary injunction if the said District Court of the United States, for the District of Idaho, Southern Division, shall finally decide that the plaintiff was not entitled thereto.

Dated this 10th day of October, 1929.

HARTFORD ACCIDENT & INDEMNITY CO.

(Seal)

By PAUL CRAVER,
Its Attorney-in-Fact.

Approved October 10th, 1929.

CHARLES C. CAVANAH, Judge.

Endorsed, Filed October 10, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION

Comes now the above-named defendant, F. M. Breshears, and moves the court for its order dismissing plaintiff's complaint upon the ground and for the reason that said complaint does not state facts sufficient in equity to entitle plaintiff to name relief.

WHEREAS, Defendant prays that said complaint be dismissed, and for costs.

H. E. RAY,
United States Attorney for the District of Idaho.

Endorsed, Filed October 10, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 1530

MEMORANDUM OPINION

November 5, 1929

Bothwell & Chapman,

Attorneys for Plaintiff.

H. E. Ray, United States District Attorney; Wm. H. Langroise and Sam S. Griffiin, Assistants,

Attorneys for Defendant.

CAVANAH, *District Judge.*

The plaintiff, a judgment debtor of the United States, brings this action to enjoin the United States Marshal of the District of Idaho from withdrawing certain monies of plaintiff on deposit in the Lincoln County National Bank, Shoshone County, Idaho, and applying the same in satisfaction of a judgment of this court entered March 7, 1921, in favor of the United States, under an execution issued on September 21, 1929, upon the contention that the judgment is unenforcible by reason of the statute of limitations of the state. The section of the state statute, relied upon by plainiff, reads: "The party in whose favor a judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement."—C. S. Sec. 6910. A lien for five years is

given by Section 6902 of the Idaho Comp. Statutes upon all real property of the judgment debtor. The levy made by the Marshal under the writ of execution is upon personal property, and not on real property, and is not an attempt to enforce any claim of a judgment lien on real property.

The two points involved in the pleadings, and urged by the United States, have been presented with much earnestness:

First, that the plaintiff cannot bring this, a separate suit, to prevent the enforcement of the judgment obtained by the United States on March 7, 1921, in the case of United States vs. George H. Schodde, et al. The contention does not seem to have any support by the authorities, for where a final judgment has been entered in a case, and thereafter an attempt is made to enforce such judgment by levy, and the contention is made that the judgment is not enforcible by reason of limitations, another and separate action may be brought to restrain the enforcement of such judgment against the officers in whose hands a writ of execution is placed.

Second, can the state statute of limitations as to the life of a judgment, or the time within which a judgment lien on real property can be enforced, be invoked as against the United States, where the United States does not attempt to levy and enforce a judgment lien upon real property,

It will be conceded that judgments in favor of the United States have the same effect in their operation as to a lien upon the property of judgment debtors as the law of the state prescribes for judgments of the state courts. United States v. Minor, 235 F. 101. And decrees of the United States Courts, subject to the acts of Congress, shall be enforced in actions at law in the same manner as such judgments in the state courts. Rule 73 of this court. The scope of the limitation provisions of the state statute relied upon, which is founded in Sections 6902 and 6910 of the state statutes, show that they relate to the time of issuance of an execution and a lien given upon real property of the judgment debtor, and do not relate to the life of a judgment, for the United States, as a sovereign power, is not bound by any statute of limitations of the state, unless Congress manifests its intention otherwise. An effort is here made to prevent the United States from enforcing a judgment secured in its own court for the benefit of the Government, and therefore the negligence or laches of the officers of the Government in failing to enforce the judgment, within the statute of limitations as to the life of a judgment, do not avail against the United States in its governmental capacity. This principle is now established beyond any doubt. The United States is not bound by any statute of limitations of a state, except where statutory provision to the contrary exists. Congress has not said that the state statute

of limitations applies to and bars the United States from enforcing its judgments after a certain period. This principle is amply sustained by the authorities, and the conclusion here announced is in entire accord with the well considered opinions of a large number of federal courts. United States v. Nashville, etc. Ry. Co., 118 U. S. 120; Stanley v. Schroalby, 147 U. S. 508; United States v. Insley, 130 U. S. 263; United States v. Thompson, 98 U. S. 486; United States v. Beebe, 127 U. S. 338; United States v. Devereaux, 90 F. 182; United States v. Harpootlian, et al., 24 F. (2) 646; United States v. Porto Rico Fruit Union, 12 F. (2) 961.

The motion to dismiss the complaint will be sustained, and the temporary restraining order heretofore issued is set aside and annulled and the defendant may have judgment for costs.
Endorsed, Filed November 6, 1929.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER

Upon consideration, and in harmony with Memorandum Opinion this day filed:

IT IS ORDERED, That the motion to dismiss the complaint be and the same is hereby sustained, and

the complaint is dismissed, and that the temporary restraining order heretofore issued be and the same is hereby set aside and annulled, and that the defendant have judgment for costs.

Dated: Moscow, Idaho, November 5th, 1929.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed November 6, 1929.
W. D. McREYNOLDS, Clerk.

CERTIFICATE OF JUDGE THAT ORDER DISMISSING PLAINTIFF'S COMPLAINT, SETTING ASIDE AND ANNNULLING THE TEMPORARY RESTRAINING ORDER THERETOFORE ISSUED AND AWARDING JUDGMENT TO DEFENDANT FOR COSTS AGAINST PLAINTIFF WAS CONSIDERED AND DECIDED AS A MATTER OF LAW

In this cause I hereby certify that the order dismissing the complaint of the plaintiff, setting aside and annulling the temporary restraining order theretofore issued and awarding judgment to defendant for costs against plaintiff made herein on November 6th, 1929, was submitted, considered and decided wholly as a matter of law upon undisputed facts appearing from the record, which are substantially set forth in the memorandum opinion of November 5, 1929, and are contained in the com-

plaint of the plaintiff and order for temporary restraining order and motion of defendant to dismiss.

This certificate is made a part of the record and will be certified and set up as a part of the proceedings herein.

Dated this 3rd day of February, 1930.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

PETITION FOR APPEAL

The above-named plaintiff, W. W. Custer, conceiving himself aggrieved by the order denying, granting and sustaining the motion of defendant to dismiss the plaintiff's complaint herein and setting aside and annulling the temporary restraining order heretofore issued and awarding defendant judgment for costs against plaintiff made and entered in the above-entitled cause on the 6th day of November, 1929, does hereby appeal from said order to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith; and

your petitioner prays that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner, W. W. Custer, desiring to supersede the execution of said order made and entered on November 6, 1929, dismissing the plaintiff's complaint and setting aside and annulling the temporary restraining order heretofore issued in this cause and awarding defendant judgment for costs against plaintiff, and the plaintiff desiring the reinstatement and continuation of said restraining order pending the determination of said appeal, tenders bond in such amount as the court may require for such purpose, and prays that with the allowance of the appeal a supersedeas may be issued, or an order reinstating and continuing said restraining order pending the determination of said appeal.

Dated this 3rd day of February, A. D. 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Petitioner,
Residing at Twin Falls, Idaho.

(Service Acknowledged.)

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
M. Franklin, Deputy.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL

And now, to-wit: on the 3rd day of February, 1930, it is ORDERED that the petition for appeal of the plaintiff herein be granted, and that the appeal be allowed as prayed for the same to operate as a supersedeas and that the restraining order heretofore issued herein be reinstated and continued in full force and effect pending the determination of said appeal upon the petitioner and plaintiff, W. W. Custer, filing a bond in the sum of $4000.00, with sufficient sureties conditioned as required by law.

Dated this 3rd day of February, 1930.

CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS

And now comes the plaintiff, W. W. Custer, and having prayed an appeal to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, from the order entered in the above-entitled cause on the 6th day of November, 1929, dismissing plaintiff's complaint herein and setting aside and annulling the temporary restraining order theretofore issued and awarding defendant judgment for costs against plaintiff, says that said order made and entered aforesaid is erroneous and unjust to this plaintiff and particularly in this:

I.

Because the court erred in holding that the defendant is entitled to levy upon the property of this plaintiff under the execution issued upon a judgment in the case of "United States of America v. George H. Schodde, et al.," wherein the plaintiff herein was a defendant, and to apply the property of this plaintiff to the satisfaction of such judgment mentioned in plaintiff's complaint after the expiration of the time provided by the statutes of the state of Idaho for the issuance of executions upon judgments within said state and in holding that the said judgment can be enforced in any manner other than the manner provided for the enforcement of judgments at law rendered in the state courts of the state of Idaho.

II.

Because the court erred in holding, ordering and deciding that the complaint of the plaintiff should

be dismissed; that the temporary restraining order heretofore issued be set aside and annulled and in ordering judgment to defendant against plaintiff for costs.

III.

Because the court erred in dismissing the complaint of plaintiff and in not granting him the relief he therein prayed for.

WHEREFORE, The said plaintiff prays that the order entered herein be reversed and set aside with directions to said District Court to enter an order in compliance with the prayer of plaintiff's complaint.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff,
Residing at Twin Falls, Idaho.

(Service Acknowledged.)

Endorsed, Filed February 3, 930.
W. D. McREYNOLDS, Clerk.
By M. FFranklin, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, That W. W. Custer, as principal, and the United

States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto the defendant in the above-entitled cause in the just and full sum of two hundred ($200) dollars, for the payment of which well and truly to be made we bind ourselves and each of us, and our, and each of our heirs, executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 3rd day of February, 1930.

The condition of this obligation is such that:

WHEREAS, the above-named W. W. Custer, plaintiff, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order made and entered in this cause on the 6th day of November, 1929, in the District Court of the United States for the District of Idaho, Southern Division.

NOW, THEREFORE, if the above-named plaintiff and appellant shall prosecute his said appeal to effect and answer all costs if he shall fail to sustain his said appeal, then the above obligation shall be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principal, W. W. Custer, has hereunto caused his name to be subscribed by his attorneys of record, and the said surety, United States Fidelity and Guaranty Com-

pany, a corporation, has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed the day and year first above written.

W. W. CUSTER, Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By Henry Whitson, Its Attorney-in-Fact,

(Seal) Surety.

Attest:

Approved this 3rd day of February, 1930.
CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL (SUPERSEDEAS)

KNOW ALL MEN BY THESE PRESENTS:

That we, W. W. Custer, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto the defendant above named in the penal sum of four thousand and no-100 ($4000.00) dollars, to be paid to the said de-

fendant, to which payment well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of February, 1930.

The condition of this obligation is that that:

WHEREAS, the above-named W. W. Custer, the said principal, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a certain order made and entered in said cause on the 6th day of November, 1929, in the United States District Court for the District of Idaho, Southern Division.

NOW, THEREFORE, If the above-named principal, W. W. Custer, shall prosecute his said appeal to effect and answer all damages and costs if he fails to make his appeal good, then the above obligation to be void, otherwise the same shall be and remain in full force and virtue.

IN WITNESS WHEREOF, The said principal has caused his name to be hereunto subscribed by his duly authorized attorneys, and the said surety has caused its name to be hereunto subscribed by its duly authorized officer, and its corporate seal affixed the day and year first above written.

W. W. CUSTER, Principal.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By Henry Whitson, Its Attorney-in-Fact,

(Seal) Surety.

Approved February 3rd, 1930.
CHARLES C. CAVANAH,
District Judge.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

CITATION

UNITED STATES OF AMERICA,—ss.

To: F. M. Breshears, United States Marshal for the District of Idaho, defendant, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth District, to be held at the City of San Francisco, in the state of California, within thirty (30) days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein W. W. Custer

is appellant and you are respondent, to show cause, if any there be, why the order in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable Charles C. Cavanah, United States District Judge, for the District of Idaho, this 3rd day of February, 1930, and of the Independence of the United States the one hundred and fifty-fourth year.

CHARLES C. CAVANAH,
District Judge.

Attest:
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy. (Seal)

Service of the foregoing Citation and receipt of copy thereof admitted by the undersigned on the date set opposite our signature.

F. M. BRESHEARS, February 3rd, 1930, defendant, by H. E. Ray, W. H. Lanroise, Sam S. Griffiin, his Attorneys.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT ON APPEAL

To: Honorable W. D. McReynolds, Clerk of the above-entitled court:

You will please prepare the record on appeal of the plaintiff, W. W. Custer, taken in the above-entitled cause, from the order made and entered therein on the 6th day of November, 1929, dismissing the complaint of the plaintiff, setting aside and annulling the temporary restraining order theretofore issued and awarding the defendant judgment against plaintiff for costs; such record to consist of the following:

Complaint.

Order for Temporary Restraining Order.

Temporary Restraining Order.

Undertaking for Temporary Restaining Order.

Motion of Defendant to Dismiss Plaintiff's Complaint.

Memorandum Opinion of Judge Cavanah, dated November 5th, 1929.

Order dated and filed November 6, 1929.

Certificate that order was decided as question of law.

All papers filed in connection with this appeal, namely:

Petition for Appeal,

Assignment of Errors,

Order Allowing Appeal,

Bond on Appeal (for costs),

Bond on Appeal (Supersedeas),

Citation.

In preparing the above record you will please omit the title of all pleadings except the first named above, but in lieu thereof insert the words, "Title of Court and Cause," to be followed by the name of the pleading or instrument.

You will also please omit the verification of all pleadings, but in lieu thereof insert wherever the pleading is verified the words, 'Duly Verified."

Dated this 3rd day of February, A. D. 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff and Appellant,
Residing at Twin Falls, Idaho.

Copy received this 3rd day of February, 1930.

H. E. RAY,
W. H. LANGROISE,
SAM S. GRIFFIN,
Attorneys for Defendant.

Endorsed, Filed February 3, 1930.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

CLERK'S CERTIFICATE

I, W. D. McREYNOLDS, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 34, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $53.10, and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 18th day of February, 1930.

W. D. McREYNOLDS, Clerk.

(SEAL)

No. 6079

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. W. CUSTER,

Appellant,

vs.

F. M. BRESHEARS, United States Marshal for the District of Idaho,

Appellee.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

Ordered above cause argued by Mr. James R. Bothwell, counsel for the appellant, and by Mr. H. E. Ray, U. S. Attorney, counsel for the appellee, and submitted to the Court for consideration and decision, with leave to counsel to enter into and file a stipulation *re* substitution of appellee, and the cause to stand submitted upon the argument this day made.

———

[Title of Court and Cause.]

MOTION FOR SUBSTITUTION OF PARTY DEFENDANT AND APPELLEE.

Comes now the plaintiff and appellant, W. W. Foster, in the above-entitled action and moves that

an order be made herein substituting Rob B. McCutcheon, United States Marshal for the District of Idaho, as defendant and appellee, in this action, as of the date of May 26, 1930.

This motion is based upon the records, papers and files in this action, including the stipulation of counsel.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Plaintiff and Appellant, Residing at Twin Falls, Idaho.

[Title of Court and Cause.]

STIPULATION.

Reserving the question as to whether the above action is one that survives,—

IT IS STIPULATED between counsel for the above-named parties that the above-named appellee, F. M. Breshears, died May 21st, 1930, and that the Honorable C. C. Cavanah, Judge of the United States Court for the District of Idaho, in open court, on May 26th, 1930, duly and regularly appointed Rob B. McCutcheon, United States Marshal for the District of Idaho, who thereupon immediately qualified, to fill the vacancy occasioned by the death of F. M. Breshears, appellee, in accordance with Title 28, Section 511, U. S. C.

IT IS FURTHER AGREED that the Court consider the argument of the case as though substitution had been made prior to May 27th, 1930.

JAMES R. BOTHWELL,
W. ORR CHAPMAN,
Attorneys for Appellant, Residence: Twin Falls, Ida.

H. E. RAY,
U. S. Attorney for the District of Idaho,
Attorney for Appellee. Residence: Boise, Idaho.

[Endorsed]: Filed Jun. 7, 1930. Paul P. O'Brien, Clerk.

At a stated term, to wit, the October Term, A. D. 1929, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the city and county of San Francisco, in the State of California, on Monday, the nineteenth day of July, in the year of our Lord one thousand nine hundred and thirty. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable CURTIS D. WILBUR, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court

in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Before RUDKIN, DIETRICH and WILBUR, Circuit Judges.

DIETRICH, Circuit Judge.—The posture of the case in point of fact need not be explained, for by the parties it is agreed the record exhibits only a general question of law, namely, whether upon a judgment for money, recovered by the United States against a citizen, in the United States District Court for the District of Idaho, an execution may issue more than five years after the entry thereof. By the court below the question was answered in the affirmative.

Section 916 of the United States Revised Statutes (28 U. S. C. A. 727) provides that:

> "The party recovering a judgment in any common-law cause in any district court, shall be entitled to similar remedies upon the same, by execution or otherwise, to reach the property of

the judgment debtor, as are provided in like causes by the laws of the State in which such court is held, or by any such laws which may subsequently be enacted and adopted by general rules of such district court; and such courts may, from time to time, by general rules, adopt such State laws as may be in force in such State in relation to remedies upon judgments, as aforesaid, by execution or otherwise."

Standing Rule 73 of the United States District Court for Idaho is as follows:

"Subject to the provisions of the acts of Congress in relation to executions, judgments in actions at law shall be enforced in the same manner as such judgments in the State Courts are enforced, and the State laws in relation to executions, sales, exemptions, rights of purchasers, right of judgment creditors and judgment debtors, redemptions, liens of judgments and of decrees and proceedings supplementary to execution as said provisions now exist or as they shall exist at the time in question are adopted as rules of this court; and the marshal of this court shall conform his proceedings thereto; * * * "

And by Section 6910 of the Idaho Compiled Statutes 1919 it is provided:

"The party in whose favor judgment is given, may at any time within five years after the entry thereof, have a writ of execution issued for its enforcement."

Under these provisions it is conceded by the Government that in the case of a judgment in favor of a private person execution thereon cannot lawfully issue after the lapse of five years from the entry thereof. And on behalf of the appellant it is not controverted that, in the absence of consent expressed or clearly implied by a federal statute, the United States is not bound by any statute of limitations. The reasoning of appellant, however, is that by virtue of section 916, *supra*, and Rule 73 of the District Court, the state statute above quoted is in effect adopted as a part of the law of the United States, that the state statute in effect creates a new right, and that the Government must take the right subject to the limitations prescribed, one of which is that execution must issue within five years or the entire right terminates.

But the right of a judgment creditor to execution process does not have its origin in the state statute; it existed at common law. 3 Cooley's Blackstone, 431; Freeman on Executions, 3d ed., Sec. 27. The statute only enlarged the time during which the right may be exercised from one year to five years, and seemingly under the common law the limitation of time was not recognized as binding upon the state. Coombs vs. Jordan, 3 Bland's Chancery (Md.), 284, 324; s. c. 22 Am Dec. 236, 271. See, also, Nimmo's Executor vs. Commonwealth, 4 Hen. & M. (Virginia Rep. Ann..) 57. While we have failed to find in any of the texts a discussion of this exception, it would appear to be highly illogical to hold

that the state may, without regard to time, bring an action to recover on a claim but by lapse of time it is barred from enforcing its judgment thereon. After all, the ultimate purpose of an action is not to get a judgment but to recover the claim, and every consideration underlying the rule that the state should not be barred from bringing the suit with equal force supports the view that it should not be barred from prosecuting the suit, once it is begun, to the complete accomplishment of the purpose thereof. If it is not to be prejudiced by the negligence of its officers and agents in bringing the action, neither should it be defeated by like negligence in respect of taking out execution process upon the judgment. In the absence of some expression to the contrary it is therefore to be presumed the legislature intended only to enlarge the time of an established rule and not to widen its scope. While in its phraseology the statute suggests nothing more, under appellant's interpretation it would operate not to enlarge but to abridge a pre-existing right of one class of judgment creditors.

With the exception of United States vs. Noojin, 155 Fed. 377, 380, which seemingly supports the conclusion we have reached, no decided case has come to our notice where the precise question has been considered. Of the other decisions cited in the briefs those most nearly in point are Fink vs. O'Neil, 106 U. S. 272; United States vs. Minor, 235 Fed. 101; United States vs. Kendall, 263 Fed. 126, and United States vs. Harpootlian, 24 Fed. (2d) 646. In the Fink case was involved only the ques-

tion whether as a creditor the Government could ignore state exemption laws, and in the public policy underlying such statutes the court found cogent reasons for holding that Congress did not intend to except the United States from the operation thereof. In each of the other three cases the question at issue was whether or not a statute limiting the duration of a judgment lien was binding upon the Government. In the Harpootlian case the question was answered in the affirmative, a conclusion apparently out of harmony with the view adopted in the other two. But however that may be, admittedly there was no such lien at common law and hence the liens in question were purely creatures of the statute. Not without reason, therefore, it could be held that the United States, as well as other creditors, must take such a lien with its statutory restrictions and limitations.

Affirmed.

[Endorsed]: Opinion. Filed June 9, 1930. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 6079.

W. W. CUSTER,

Appellant,

vs.

ROB B. McCUTCHEON, Substituted for F. M. BRESHEARS, United States Marshal for the District of Idaho, Deceased,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the District of Idaho, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Idaho, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the order of the said District Court in this cause be, and hereby is, affirmed.

[Endorsed]: Decree. Filed and entered Jun. 9, 1930. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing forty-five (45) pages, numbered from and including 1 to and including 45, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 13th day of August, A. D. 1930.

[Seal] PAUL P. O'BRIEN,
Clerk.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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